

REMARKS**Status of the Claims**

Claims 1 – 67 and 70 – 132 are pending in the application.

Request for Withdrawal of Final Office Action

Applicants respectfully request that the Examiner withdraw the final Office Action dated February 11, 2009. Applicants submit that all of the claims pending in the application were not fully addressed in the final Office Action.

Claims 90 and 128-132

According to MPEP 707.07(i), "Each Claim To Be Mentioned in Each Office Action":

In every Office action, each pending claim should be mentioned by number, and its treatment or status given. Since a claim retains its original numeral throughout the prosecution of the application, its history through successive actions is thus easily traceable. Each action should include a summary of the status of all claims presented for examination. Form PTO-326 "Office Action Summary" should be used.

In the Disposition of Claims, the Examiner has indicated that claims 70 – 127, among others, are rejected. However, the Examiner has failed to provide any substantive arguments as to the rejection of claim 90 in the Detailed Action.

Applicants further note that claims 128 – 132 were not mentioned by number, nor was there any indication as to their treatment or status, either in the Disposition of Claims or in the Detailed Action.

Applicants respectfully request that the Examiner examine claims 90 and 128 – 132.

Request to Withdraw Final Office Action,
Request for Examination of Pending Claims 90 and 128 – 132,
and Request for Clarification of the Status of Claim 65

USSN 10/621,637 and 90/006,209

Claim 65

Furthermore, the Examiner has indicated that claim 65 is both rejected on the grounds of *Res Judicata* and objected to (i.e., would be allowable if rewritten as an independent claim). Applicants respectfully request that the Examiner clarify the status of claim 65.

Further, Applicants believe that the Examiner's indication that claims 1, 2, 9-12, 29-34, 52, 54 and 61-65 are rejected on the ground of *Res Judicata* is in error. *Res Judicata* pertains when a final judgment on the merits of the case has been entered by a court having jurisdiction over the matter. However, in MPEP 1214.01(I) it is explicitly stated, when referring to the procedure following new grounds of rejection by the Board, that if the appellant elects to proceed before the Examiner with regard to the new rejection (i.e., if prosecution is reopened, as it was here), the Board's affirmance of the Examiner's rejection will be treated as nonfinal. Thus, the doctrine of *Res Judicata* is inapplicable in this instance.

Applicants recognize, with respect to the Reexamination claims (as opposed to claims newly presented in the Reissue proceeding), that the new ground of rejection raised by the Board reopens prosecution only for the subject matter of the claims to which the new rejection was applied. As the Board applied a new ground of rejection to claims 5, 13 and 57, prosecution of these claims is reopened. As the Examiner has rejected claims 5, 13 and 57 over Dempsey, Uchida, Grot and/or Vanderborgh, and as prosecution as to those claims has been reopened, it is entirely proper for Applicants to argue patentability over the combination of these references with respect to these claims.

Further, the MPEP also clearly states that "Prosecution before the examiner of the 37 CFR 14.50(b) rejection can incidentally result in overcoming the affirmed rejection even though the affirmed rejection is not open to further prosecution." MPEP 1214.01(I) (emphasis added.) Thus, if Applicants' arguments are compelling as to claims 5, 13 and 57, it would be entirely proper for claims 1, 2, 9-12, 29-34, 52, 54 and 61-65 to be

allowed as an incidental result of the continued prosecution of the 37 CFR 14.50(b) rejections.

Conclusion

By this Request, Applicants are not substantively responding to the Examiner's rejections presented in the final Office Action. Rather, Applicants are merely responding to procedural deficiencies of the final Office Action, which warrant its withdrawal.

Applicants respectfully request the withdrawal of the final Office Action and further examination of the application.

Respectfully submitted,
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